STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 21, 2006
v	No. 263945 Wayne Circuit Court
TORRANCE A. GRAHAM, Defendant-Appellant.	LC No. 05-000650-01

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced, as a third habitual offender, MCL 769.11, to life imprisonment for his first-degree murder conviction, one to five years' imprisonment for his felon in possession of a firearm conviction, and two years' imprisonment for his felony-firearm conviction. We affirm.

Defendant first argues that he was denied his right to an impartial jury because the trial court permitted a reluctant juror to serve on the jury panel. Defendant has waived appellate review of this issue. Before the jury was sworn, the court asked the parties, "both sides are satisfied with this jury?" The prosecutor replied, "yes, your honor," and defense counsel replied, "yes, your honor, we're satisfied." After learning of Juror 13's reluctance to serve on the jury and his discussion with some of the court officers, the court stated to the parties, "maybe what I should do is just bring him out and remind him that he's not to discuss the case, not have any contacts with anybody about this case." The prosecutor replied, "thank you," and defense counsel replied, "I agree with that." By expressly approving the jury and the court's actions regarding Juror 13, defendant has waived this issue. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant next argues that prosecutorial misconduct denied him his right to a fair trial. We disagree. Where issues of prosecutorial misconduct are unpreserved, this Court reviews the record for plain error affecting substantial rights, and will reverse only if the "error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Issues of prosecutorial misconduct are considered "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of the defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Ackerman*, *supra* at 450. The "propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Defendant argues that the prosecutor misstated the facts of the case when he stated, "here we have two shots to the head, direct, point-blank shots to the head." The statement regarding point-blank firing was not improper because the evidence supported the statement. Although the medical examiner was unable to determine the range of fire, Lemar Davenport maintained that defendant was about two to three feet away from Alvin Dorsey when he heard shots fired. Brenda McCurtis-Waites also maintained that defendant and Dorsey were in the same room when the shooting occurred. Further, testimony was presented which showed that Dorsey died from two gunshot wounds to the head. The evidence supported the prosecutor's statement, and therefore, no misconduct occurred.

Defendant also argues that the prosecutor misstated the law when he argued that a person has a diminished right of self-defense when he leaves his home. The prosecutor's statement was not inaccurate. Generally, a person acts in self-defense if that person is free from fault and, under all the circumstances, he honestly and reasonably believed that he was in imminent danger of death or great bodily harm and that it was necessary for him to exercise deadly force. *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). A person is *never* required to retreat from a sudden, fierce, and violent attack, nor is he required to retreat from an attacker who he reasonably believes is about to use a deadly weapon, and one who is attacked in his dwelling is *never* required to retreat where it is otherwise necessary to exercise deadly force in self-defense. *Id*. at 119-120.

Although the prosecutor's choice of words, "your rights of self-defense diminish," may differ from the actual language of the law, the prosecutor did not misstate the law on self-defense and the duty to retreat. The prosecutor merely argued that once a person leaves his home, the duty to retreat is greater because at that point he must try to get away from the situation before using deadly force, which is not a misstatement of law. The castle doctrine "permits one who is within his dwelling to exercise deadly force even if an avenue of safe retreat is available, as long as it is otherwise reasonably necessary to exercise deadly force." *Riddle*, *supra*, p 142. However, to overcome the duty to retreat outside of the home, there must be a "sudden, fierce, and violent attack," or a person must reasonably believe that his or her attacker is about to use a deadly weapon. These exceptions require more urgency than a situation involving someone defending himself within his own dwelling. *Id*. at 119-120, 142. The prosecutor did not misstate the law, and therefore, defendant's claim is without merit.

Defendant further argues that the prosecutor improperly argued that defendant started shooting because he started an argument that got out of his control. This argument was not improper in light of the facts presented. Although Davenport did not hear defendant and Dorsey argue, evidence was presented that showed that, before Davenport came into the house, defendant and Dorsey had their differences regarding smoking a "blunt." Defendant was trying to get Dorsey to smoke a blunt, but Dorsey informed defendant that he was tired and did not

want to smoke. However, defendant went to the car anyway to get the "blunt." When defendant returned from the car, he again insisted that Dorsey smoke with him. Shortly thereafter, Waites heard shooting. Although no direct evidence of an argument was presented, a prosecutor is "free to argue the evidence and any reasonable inferences that may arise from the evidence." *Ackerman*, *supra* at 450. The evidence showed that defendant insisted on smoking a "blunt" with Dorsey when Dorsey consistently expressed that he did not want to smoke. The prosecutor's argument regarding this encounter was reasonable, and therefore, defendant has failed to show misconduct.

Defendant further argues that the prosecutor improperly bolstered his case when he explained to the jury the investigative subpoena process and repeatedly assured the jurors that he was not trying to mislead them. Defendant argues that the prosecutor's assurance bolstered his case and the police officer's credibility. We disagree.

During closing argument, defendant accused the prosecution of withholding information and misleading the jury. The prosecutor, during rebuttal argument, explained to the jury the investigative subpoena process to dispute defendant's claim that he was trying to withhold information or cover up some alleged impropriety. The prosecutor's remarks regarding the investigative subpoena process and his assurances of propriety were not improper, but rather, an invited response to defense counsel's accusation that there was "a lot of lying, lot of mischief and a lot of cover-up as a reason to doubt the sincerity of the case." See *People v Jones*, 468 Mich 345, 359; 662 NW2d 376 (2003). The prosecutor responded to defendant's accusations, and his response was proper in light of the accusations made. *Id.* Defendant invited the prosecutor's remarks with his accusations of prosecutorial impropriety, and therefore, he cannot now argue that the remarks were improper. *Id.*

All of defendant's prosecutorial misconduct claims lack merit. In any event, even if the challenged remarks and arguments had any prejudicial potential, the trial court's instructions were sufficient to eliminate any prejudice that may have stemmed from the statements and arguments. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). The court instructed the jury that the lawyers' statements and arguments were not evidence and that it should "only accept things that the lawyers say that are supported by evidence or by [its] own common sense and general knowledge." The court also instructed the jurors that it was the court's duty to instruct them on the law and if a lawyer said something different, the jury was to follow the court's instructions, not the lawyer's.

Lastly, defendant argues that he was denied the effective assistance of counsel. We disagree. Because defendant did not request and the trial court did not hold an evidentiary hearing, our review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To establish a claim of ineffective assistance of counsel a defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005), vacated in part on other grounds 720 NW2d 754 (2006). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d

342 (2005). Thus, the defendant must overcome a strong presumption that defense counsel's action or inaction constituted sound trial strategy. *Walker, supra*, p 545.

Defendant argues that he was denied the effective assistance of counsel because defense counsel failed to remove Juror 13 from the jury panel. Defendant argues that Juror 13 was incapable of rendering a just and impartial verdict because he was not of sound mind. We disagree.

Defense counsel's decision not to object to Juror 13's continued presence on the jury was not objectively unreasonable nor did it deny defendant the effective assistance of counsel. Juror 13 expressed some reluctance about serving on the jury panel. The record shows that Juror 13 was a student who also worked, which likely contributed to his reluctance to serve on the jury panel. Juror 13 expressed to the court that he would rather not serve on the jury, but maintained that if he were chosen to serve he would be committed and perform his duties as expected.

Defendant has failed to show that Juror 13's initial reluctance to serve on the jury prevented him from making a just and impartial decision. Although Juror 13 may have inquired into whether he could be relinquished from the jury panel, there is nothing in the record that shows that Juror 13 could not, or did not, perform his duties as promised. "[A]n attorney's decisions relating to the selection of jurors generally involve matters of trial strategy . . . ." *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Based on Juror 13's assurance that he would perform his job as expected, and the trial court's acceptance of his assurance, there is no reason why defense counsel should have opted to dismiss Juror 13 from the panel, or further inquired into a matter that the court and the attorneys deemed resolved. Defendant has failed to show that defense counsel's failure to remove Juror 13, or further inquire into his reluctance to serve on the jury, was objectively unreasonable and denied defendant a fair trial. *Walker, supra* at 545.

Defendant also argues that he was denied the effective assistance of counsel because defense counsel failed to object to several alleged instances of prosecutorial misconduct. We disagree. As discussed *supra*, the prosecutor did not engage in any misconduct. The prosecutor did not misstate the law or the facts of the case, nor did he improperly bolster his case. Because the prosecutor did not engage in misconduct and "[c]ounsel is not obligated to make futile objections," defense counsel was not ineffective. *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kathleen Jansen